Ameritech had failed to properly process the customer name and address information which TCG had timely provided, and had ultimately deleted the database entry for that customer prior to the shooting incident without ever contacting TCG directly.

As admitted in the Affidavit of Mr. Mayer,[52] where a competitive carrier such as TCG provides manual updates to Ameritech's contractor, its contractor completes the data entry process. In addition, as the example above shows, it is not only the error checking routines prior to entry of the information into the database which is critical, but how the information in the database is maintained, and how rapidly and effectively discovered errors are corrected which is of great concern. the failure of Ameritech's contractor to input submitted data, or its decision to delete data records without TCG's approval will cause problems only for TCG and its customers, not for Ameritech and its customers.

Ameritech states in its Brief[53] that it "currently is providing Brooks Fiber, MFS and TCG with nondiscriminatory access to poles, ducts, conduits and rights-of-way under their agreements." Mr. Edwards' affidavit further claims that as of April 30, 1997 Ameritech was processing orders for poles, ducts, conduit or rights-of-way from TCG.[54] This claim is surprising to TCG, and appears to be another instance where Ameritech simply has the facts stated incorrectly. TCG is unaware of <u>any</u> requests for poles, ducts, conduit or rights-of-way being made to Ameritech for use of any of its "structure" facilities in the areas served by TCG Detroit. As TCG's experience with obtaining service from Ameritech in other areas

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[52]See ¶ 253.

[53]Ameritech Brief at 41.

[54]Affidavit of Ameritech Witness Edwards at ¶ 86.

shows,[55] the simple requirement in an interconnection agreement that Ameritech must provide nondiscriminatory access to TCG does **not** prove that access is actually readily available to TCG, not that such access will ever be given in true nondiscriminatory fashion.

Ameritech also asserts it has met the dialing parity requirement of Section 271(c)(2)(B)(xii) of the competitive check list. This assertion, however, is false. Dialing parity has not been fully implemented by Ameritech despite numerous MPSC orders requiring compliance. Ameritech attempts to incorrectly characterize the dialing parity requirement in the Act as local dialing parity, available through interconnection, number portability, and nondiscriminatory access to phone numbers.[56] The relevant form of dialing parity, however, is intraLATA dialing parity which Ameritech, by its own admission, will not fully implement, in open defiance of MPSC orders and Michigan law, until its own long-distance affiliate obtains authority to provide in-region long-distance service.[57]

As long ago as early 1994 the MPSC issued its first Order requiring Ameritech (then Michigan Bell Telephone Company) and GTE North, Inc., to implement 1+ dialing parity, requiring implementation no later than January 1, 1996.[58] The MPSC also denied petitions for rehearing or reconsideration in that case, in an Order dated July 19, 1994. Thus, despite continued litigation, Ameritech had nearly two years time to prepare for and implement 1+ dialing parity in Michigan.

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[55]As one example, see the Affidavit of Michael Pelletier at ¶ 10, regarding the provisioning of trunks with a single point of failure.

[56]Ameritech Michigan Brief at 36.

[57]Ameritech Michigan Brief at 37, n. 23.

[58]See, Re: MCI v Michigan Bell Telephone Co and GTE North Inc., MPSC Case No. U-10138, (Opinion and Order, February 24, 1994).

In addition to setting an implementation schedule, the February 24,1994 Order also established a task force to investigate and report on the dialing parity issue, and on March 10, 1995, the MPSC issued another Opinion and Order, adopting the recommendations of the task force and revising the implementation schedule for dialing parity, with substantial implementation to occur by January 1, 1996.[59]

Ameritech actions in not fully implementing intraLATA 1+ dialing parity also violate Michigan law, which provides a framework for the implementation of 1+ intraLATA dialing parity.[60] While that framework included a phase-in schedule for dialing parity, which was slower than the MPSC's, it also contained a specific provision stating that it did not "alter or void any orders of the [MPSC] regarding 1+ intraLATA toll dialing parity issued on or before June 1, 1995."[61] Still, Ameritech did not comply with the MPSC's orders. On January 1, 1996, Ameritech implemented dialing parity for only 10% of its customers.[62]

Subsequently, MCI and AT&T filed a motion to compel with the MPSC, seeking enforcement of the dialing parity scheduling orders. On June 26, 1996, the MPSC issued an Order granting the motion to compel, and directing Ameritech to comply with its prior Orders within thirty days. On October 7, 1996, the MPSC also denied Ameritech's motions for rehearing, to reopen the record, and for a stay of the June 1996 order. When even that

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[59]Re: MCI v Ameritech Michigan and GTE North Inc., Case No. U-10138, (Order on Rehearing, October 7, 1996).

[60]Mich. Comp. Law §§ 484.2312a and 2312b (1995).

[61]Mich. Comp. Laws §484.312b(4).

[62]Interestingly, an in obvious anticipation of its first Section 271 filing, Ameritech implemented intraLATA dialing parity in an additional 40% of its end offices on December 2, 1996, and a further 20% of its end offices on January 2, 1997. As the Commission knows, Ameritech's prior 271 application was filed on January 2, 1997.

action failed to produce compliance by Ameritech, AT&T and MCI successfully obtained an order from Ingham County Circuit Court, granting a writ of mandamus and directing Ameritech to comply with the June 26 and October 7, 1996 MPSC orders.[63]

Still unsatisfied, Ameritech filed an emergency appeal with the Michigan Court of Appeals and successfully obtained a stay from that court of the MPSC orders and the circuit court order, pending a full appeal of the MPSC's Orders, effectively suspending all further implementation of 1+ dialing parity in its Michigan exchanges.[64]

As of the date of the instant application, Ameritech has only implemented intraLATA dialing parity in 80% of its end offices. For twenty percent of its end offices, Ameritech refuses to adhere to the requirements of Michigan law and the Act, and will not provide intraLATA dialing parity until ACI obtains interLATA authority.[65] Thus, Ameritech fails to meet the dialing parity requirement contained in Section 271(c)(2)(B)(xii), given the prior state mandate for dialing parity.[66] For this reason alone, Ameritech has not met the Section 271 check list, and its application must be denied.

V. AMERITECH'S INTERPRETATION OF THE 'OWN FACILITIES' REQUIREMENT IS WRONG.

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[63]AT&T Communications of Michigan, Inc, et. al. v Michigan Bell Telephone Co., d/b/a Ameritech Michigan, Circuit Court No. 96-84800-AW, Order Granting Writ of Mandamus, November 20, 1996.

[64]Ameritech Michigan v MPSC, et. al., Court of Appeals Docket No. 198706, Order, December 4, 1996.

[65]Affidavit of Michael Pelletier at ¶ 31.

[66]Section 271(e)(2)(B) "grandfathers" the MPSC's intraLATA 1+ dialing parity order as implementation was required in a decision issued by December 19, 1995. Ameritech Michigan therefore is precluded from arguing that it does not have to implement intraLATA 1+ dialing parity prior to obtaining interLATA authority.

Ameritech must also show that the competitors whose interconnection agreements Ameritech presents as justification for its entry into interLATA business are providing service predominantly using their own facilities."[67] "Own facilities" plainly means that all or most of the network elements such a competitor uses are part of the competitor's network or are obtained from an entity other than Ameritech. Ameritech's transparent claim that facilities obtained from it by TCG would qualify as TCG's "own facilities" flies in the face of logic as well as the plain language of the statute.[68] Logically, a consumer does not have a real competitive alternative so long as he/she remains dependent on the service, network element, or price controlled by the incumbent monopoly, Ameritech. Were this not the case, there would have been no need in the Act to distinguish between "exclusively over their own telephone exchange service facilities" and "predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier"(Emphasis supplied).[69] The "other carrier in this case could be the incumbent itself or any competitor..[70]

Ameritech contends that TCG provides local telephone service in Michigan over facilities that have been constructed and installed by TCG itself or acquired from a source

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[67]See Section 271(c)(1)(A).

[68]Ameritech Brief at 12.

[69]Section 271(c)(1)(A).

[70]"Legislative history supports this interpretation of the plain language of the Act, making the meaning of the word "own" "possessed" rather "controlled" by: " ...the fact is that local carriers are in a unique position because all long-distance calls must pass through their facilities. This control lets the local carriers discriminate against their competitors in the delivery of long-distance service. If not a single other entity can offer this service with their own equipment, the locals will continue to stifle competition." Congressman Freylinghausen, 141 Cong. Rec. H8425, H8455 (Emphasis added).

other than Ameritech.[71] Ameritech's argument is incorrect. While it is true TCG prefers to provide basic local exchange service over its own facilities, it utilizes some Ameritech facilities to provide local service; specifically, DS-1s and DS-3s purchased at Ameritech's existing Access Tariff rates.[72] TCG has not been offered rates for unbundled network elements to use as substitutes for the access services it is currently obtaining, other than the rates in the TCG/Ameritech Agreement. As discussed above, the TCG/Ameritech Agreement has not been implemented, and therefore, the rates contained in it for unbundled network facilities are not available to TCG at this time.[73]

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[71]Ameritech Michigan Brief at 13.

[72]Affidavit of Michael Pelletier at ¶ 27.

[73]Id.

VI. AMERITECH MICHIGAN AND ACI DO NOT CURRENTLY SATISFY THE "SEPARATE AFFILIATE" REQUIREMENTS OF §272 OF THE 1996 ACT.

A. Evidence From Michigan Shows ACI Is Not A Separate Affiliate.

One of the key safeguards of the Act intended to preclude improper discrimination, cross-subsidization, and other forms of anti-competitive conduct, is the separate affiliate requirements found in Section 272. Ameritech has established an affiliate separate from Ameritech, Ameritech Communications, Inc. ("ACI"), which it contends meets this requirement. Ameritech asserts that it has complied with the requirements of Section 272 because ACI will be the entity which will provide in-region interLATA services in Michigan. The FCC has concluded that the Section 272 safeguards "insure that a §272 affiliate must follow the same procedures as its competitors in order to gain access to a BOC's facilities" and that the safeguards constitute "a flat prohibition against discrimination."[74]

Section 272(b) establishes structural and transactional requirements for the separate affiliate established pursuant to Section 272(a). As discussed below, and in the attached Affidavit of Dr. Paul Teske,[75] Ameritech has not complied with all of these requirements.

Specifically, the separate affiliate required by Section 272(b):

> (1) shall operate independently from the Bell Operating Company;
>
> (2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell Operating Company of which it is an affiliate;

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[74]In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order, ¶¶ 15 & 16 (Commission, December 24, 1996).

[75]See Affidavit of Dr. Paul Teske, attached as Exhibit F.

> (3) shall have separate officers, directors, and employees from the Bell Operating Company of which it is an affiliate;
>
> (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell Operating Company; and
>
> (5) shall conduct all transactions with the Bell Operating Company of which it is an affiliate on an arms length basis with any such transactions reduced to writing and available for public inspection.

Although Ameritech alleges that it has complied with all of the above requirements, the factual evidence produced in ACI certificate proceedings undermines Ameritech's claimed separate affiliate operate "independently" from the Bell Operating Company, the evidence in the Michigan proceeding showed that ACI and Ameritech "shared" an extraordinary amount of services, staff, and facilities.[76]

Section 272(b)(2) requires separate books, records, and accounts. However, evidentiary proceedings in Michigan showed that in fact there was an amazing lack of documentation and accounting with respect to transactions between ACI and Ameritech.[77] In addition, although Section 272(b)(3) requires separate employees, evidentiary proceedings showed that in fact top ACI officers didn't even know whether ACI had 200 employees or 0 employees.[78]

Section 272(b)(4) also requires that a separate affiliate may not obtain credit on a basis which grants recourse to the assets of the Bell Operating Company. Again, evidentiary

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[76]See Teske Affidavit, ¶ 7.

[77]See Teske Affidavit, ¶ 8.

[78]See Teske Affidavit, ¶ 9.

proceedings showed that ACI was represented as having the "full financial backing: of Ameritech and ACI's top financial officer did not even know what that really meant.[79]

Furthermore, while Section 272(b)(5) requires that all transactions between the affiliate and the BOC be on "an arms length basis," with transactions reduced to writing and available for public inspection, the evidence showed in fact that transactions were hardly on an arms length basis, were not reduced to writing, and could not even be presented for the MPSC's inspection, much less for the public's.[80]

The following paragraphs examine in more detail Ameritech's claim to have complied with all of the requirements of Section 272(b).

Section 272(b)(1) provides that the separate affiliate "shall operate independently from the Bell Operating Company." Proceedings before the MPSC in recent months have examined the extent to which the affiliate ACI operates independently from Ameritech. On March 1, 1996, ACI filed an Application with the MPSC seeking a license to provide basic local exchange service to exchanges currently served by Ameritech and GTE North, Inc.[81] ACI indicated that its request for a license to provide basic local exchange service was part of its plan to offer its customers "one-stop shopping" service so as to bundle local, long-distance and other services.[82]

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[79]See Teske Affidavit, ¶¶ 8 &10.

[80]See Teske Affidavit, ¶ 11.

[81]Re Ameritech Communications Inc., MPSC Case No. U-11053, (Application filed March 1, 1996).

[82]Id., ¶¶ 4 & 5.

ACI contended to the MPSC that ACI was formed to provide interLATA telecommunication services in anticipation that it would be allowed to do so under the Act, subject to certain structural and transactional requirements.[83]

ACI presented the testimony of several witnesses, some of whom were actually working in business units of Ameritech (*e.g.*, Gregory J. Dunny), rather than for ACI. The testimony of three ACI witnesses demonstrated that structural separation in the "planned operating relationship" between Ameritech and ACI had not been accomplished sufficiently to protect consumers and insure the growth of competition.[84]

In fact, ACI's own witnesses presented a comprehensive list of services, including both staff and facilities, which would be shared by ACI and Ameritech including, but not limited to: accounting and financial services; human resource services; accounting, financial, and human resource transaction processing and data accumulation; auditing, legal, pension, public affairs and labor relation services; tax compliance services; insurance policy coverage under Ameritech's umbrella policies; and what was described as "general corporate oversight inherent in a parent/subsidiary relationship."[85]

The evidentiary record made before the MPSC is replete with evidence indicating the strong potential for both detectable and undetectable cross-subsidization between Ameritech and ACI. In order to meet the required Michigan showing of sufficient financial resources to provide the services in the area requested, ACI represented that its parent Ameritech would

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[83]Id., ¶¶ 18 & 19.

[84]See Testimony of Dr. Paul Teske on Behalf of TCG Detroit; Testimony of Cathleen M. Conway on Behalf of AT&T Communications of Michigan, Inc.; and Testimony of Lee Selwyn, President of Economics and Technology, Inc., on Behalf of AT&T Communications of Michigan, Inc., all filed in Re Ameritech Communications, Inc., MPSC Case No. U-11053

[85]See Teske Affidavit, ¶ 7.

be providing its full financial backing to ACI and stand behind its financial obligations in order to get its operations running and to provide service to each person requesting service in the territories which it intended to serve.[86] Although ACI asserted that this full financial backing from Ameritech would not encumber or pledge any assets of Ameritech's local exchange operations, ACI's Vice President of Finance and Administration, Patrick Earley, testified that he did not know which financial assets of Ameritech would not be pledged or encumbered.[87] The Michigan Administrative Law Judge presiding over this case found "Mr. Earley's lack of knowledge is astonishing," but that "the compliance or lack of compliance with the [federal Telecommunications Act's] separate subsidiary requirement is not material," and that "his testimony did establish that Ameritech Corporation is committed to providing ACI with whatever financial support it requires, and that Ameritech Corporation has the resources to do so."[88]

Perhaps most revealing, however, was the testimony of ACI's Vice President of Finance and Administration that Ameritech had loaned to ACI as of the date of his testimony, approximately $90,000,000, that all of the money provided by Ameritech to ACI to such date had been in the form of unsecured debt, and that these monies were provided pursuant to only an oral agreement, since there appeared to be no written documentation which described the terms and conditions of these so-called loans.[89] This is not an arms

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[86]Transcript Vol. 5, pp. 399-400; Application ¶¶ 8 & 11.

[87]See Teske Affidavit, ¶ 10.

[88]ACI Proceeding, Proposal for Decision, issued July 18, 1996 at' 8-9.

[89]See Teske Affidavit, ¶¶ 8 & 10.

length transaction, nor was it reduced to writing and made available for public inspection as required by §272(b)(5).

It is clear from the record in the ACI proceeding that cross-subsidies from Ameritech to ACI have taken place, and continue to take place. In addition, the Vice-President of Finance for ACI was not aware of the magnitude of the transfer of expenses from Ameritech, but that the information needed to identify the magnitude of the transfer of expenses incurred by ACI and absorbed by Ameritech has not been provided to the MPSC in ACI's Application. In addition, ACI states in the record that ACI "will be acquiring assets in numerous fashions, either directly or indirectly" from Ameritech and that "up until that time we do start servicing customers there may be an occasion where we acquire them on an indirect basis."

In sum, ACI's statement regarding asset acquisition is that ACI will acquire assets "indirectly" through the mechanism of having Ameritech incur expenses to acquire assets for the use of ACI. This is a textbook case of cross-subsidy, and definitely eradicates any notion that Ameritech and ACI are operating as separate affiliates. Mr. Earley's statements regarding the funding of ACI through Ameritech debt without a written agreement, or any plan to pay back the funds, classifies this arrangement as more of a gift than a loan, or other bona fide financial arrangement. ACI is a separate affiliate of Ameritech only in form, but not in practice. Of equal concern is the appearance that ACI's executive officers are oblivious to the need for the separate affiliate transactions between Ameritech and ACI.

The Michigan Commission Staff's top telecommunications regulator, William J. Celio, also testified on these troublesome findings:

> Unfortunately the record in this case points out the Commission cannot rely on structural safeguards alone...Dr. Teese admits he relied on confidential information related to the location of U.S. Signal's network which he received from Ameritech to develop

> his testimony as a witness for ACI. Additionally Bill Cole of ACI was previously responsible for the central office provisioning for Ameritech. He now is in the employ of ACI. He certainly brings network information about ACI's competitor-Ameritech Michigan with him. The hearing in this case is another example. Attorneys Amy Clark and Daniel Demlow represent ACI one day and Ameritech Michigan the next. This would surely result in the spill over of the complexities of the telecommunications industry and possibly confidential knowledge simply by the very nature of the positions these two persons occupy in the organization, not by any illegal action. In short, the federal safeguards may be inadequate to prevent Ameritech from using its monopoly or at least dominant position in a manner contrary to the public interest without additional protection.[90]

B. Evidence in Ohio Cases Further Substantiates Ameritech's Lack of Compliance,

In addition to the evidence from Michigan, two pending Ohio cases substantiate that Ameritech has not complied with the separate affiliate and nondiscrimination standards in the 1996 Act. These cases involve ACI's applications for long distance and local exchange certification in Ohio.[91]

Evidence demonstrating a lack of independence between ACI and its operating company affiliates includes the **interdependent** organizational reporting structure of Ameritech personnel. The Presidents of the Ameritech operating companies ("AOCs") report to the same Ameritech Corporation Vice President, Barry Allen, as does ACI's

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[90]Re Ameritech Communications, Inc., MPSC Case No. U-11053, pp 9-10, Testimony of William J. Celio, P.E.

[91]In the Matter of the Application of Ameritech Communications of Ohio, Inc. For Authority to Provide Competitive Telecommunication Services in the State of Ohio, Public Utilities Commission of Ohio Case No. 96-327-CT-ACE; and In the Matter of the Application of Ameritech Communications of Ohio, Inc. For a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Service Throughout the State of Ohio, Public Utilities Commission of Ohio Case No. 96-658-TP-ACE ("ACI Ohio Cases").

President, Steven Nowick.[92] The AOC Vice Presidents - Regulatory report to the same Ameritech Corporation Vice President, Lawrence Strickling, as does ACI's Regulatory Director, Blaine Gilles in addition to reporting to their respective company affiliate vice-presidents.[93] ACI has Ohio counsel, both in-house and retained, that also represent Ameritech Ohio.[94]

The result of this interdependent organizational reporting structure is that strategic information between affiliates is shared. For example, ACI Director Gilles has knowledge of some of ACI's most confidential marketing strategies.[95] Director Gilles' supervisor, Mr. Strickling, has ultimate managerial responsibility over persons who prepare various AOC cost studies and tariffs. Mr. Strickling's organization prepares the AOCs' wholesale tariffs -- tariffs that TCG believes favor ACI -- from which ACI (and competitors) will purchase AOC local service to resell.[96] Mr. Strickling and his supervisees, including ACI's Director, the AOC Vice Presidents and others, regularly attend the same meetings together.[97]

This intermingling of personnel creates an interdependence between the AOCs and ACI-- not an independence as required by law. The sharing of managers for ACI and the AOCs institutionalizes this interdependence. It asks too much of these human managers (and

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[92]See Exhibit G, attached, which is based upon TCG Ex. 15, ACI Ohio Cases. The Commission should know that recent news accounts, which occurred after the close of evidence in this case, indicate that some personnel changes have been made.

[93]Id.

[94]ACI Ohio Cases, Tr. VIII at 144.

[95]ACI Ohio Cases, Tr. XII at 59

[96]ACI Ohio Cases, Tr. VIII at 41-49

[97]ACI Ohio Cases, Tr. VIII at 50-66. (There are no minutes or summaries of these meetings that could be audited. Id. at 66.)

indeed strains credulity to believe) that they can create a wall in their own minds between ACI's interests and AOCs' interests when making decisions affecting the two.

Ameritech's financing of ACI in Ohio also demonstrates that ACI is not independent from the AOCs. Ameritech's funding is substantially derived via the dividends it receives from the AOCs. This funding has been used to provide ACI with its sole source of funds -- a loan that only an interdependent affiliate could obtain. Ameritech's loan to ACI: (1) is not memorialized in writing; (2) has no payback term; and (3) has an interest rate not even known by ACI's Vice President-Finance.[98]

The AOCs have the ability to discriminate in favor of ACI and against competitors in the provision of goods and services, in violation of Section 272(c)(1). For example, Ameritech has a "mechanism" through which it makes available to ACI various AOC corporate resources, such as the services of certain AOC personnel.[99] Ameritech Ohio's Vice President - Regulatory has performed various services in support of ACI interests.[100] These services are not available to competitors.[101]

C. Evidence in Illinois Cases Further Confirms Ameritech's Lack of Compliance.

In addition to the evidence from Michigan and Ohio of Ameritech's violation of Section 272's safeguards, evidence from Illinois shows that Ameritech has no intention of treating ACI as a truly separate subsidiary. In its ACI certification proceedings in Michigan, Illinois, and Ohio, ACI claimed that it has not received network facilities from its BOC

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[98]ACI Ohio Cases, Tr. IV at 46,47,49,53

[99]ACI Ohio Cases, Tr. VIII at 94-97

[100]Id. at 95

[101]Id. at 96-97

affiliates transferred directly, or through its parent, Ameritech Corporation.[102] Ameritech claimed that such transfers did not occur, and therefore, it implicitly stated that no written documentation of any such transactions existed for public inspection, as is required by Section 272(b)(5). Ameritech's claim, however, turns out to be untrue. Ameritech filed a petition in its annual price cap proceeding in Illinois to determine whether Ameritech has met the infrastructure commitment in the Ameritech Illinois Price Cap Order.[103] In its petition Ameritech admitted that: "Infrastructure which Ameritech Illinois had originally assumed would be part of its network has now been shifted to separate subsidiaries such as New Media Enterprises (broadband video distribution facilities) and **Ameritech Communications Inc. Of Illinois (long distance).**"[104] Ameritech has already violated Section 272(b)(5)'s transactional safeguards in Illinois by failing to disclose the transfer of network facilities to ACI, and failing to reduce the transaction to writing and make the documentation available for public inspection.

Given the interstate nature of long distance facilities, it is likely that such a transfer of facilities to Ameritech Corporation's long distance affiliate occurred in Michigan as well.

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[102]See Tr. Volume IV at 420, 430, 582-583, 594-595, and Response of ACI to Comcast Corporation Data Request No. CCAC0017, MPSC Case No. U-11053; Response of ACI to Data Request TCG-11, Illinois Commerce Commission Docket No. 95-0443; ACI Ohio Cases, Ameritech Communications of Ohio, Inc.'s Response to TCG Cleveland's Interrogatories and Requests for Production of Documents, October 22, 1996, Questions 21 and 22; all attached as Exhibit H.

[103]See Petition for Clarification of Illinois Bell Telephone Company, Illinois Bell Telephone Company Petition for Clarification of Investment Obligation under the Alternative Regulation Plan, Docket No. 96-0469 (Illinois Commerce Commission, September 20, 1996) (attached as Exhibit I).

[104]Id. (Emphasis supplied).

Thus, Ameritech's claims that it today complies with the requirements of §272(b)(5) is false, and its assertions of future compliance is suspect.

D. Ameritech Must Be Prevented From Using ACI to Cross-Subsidize.

Given the evidence from the state proceedings, it is clear Ameritech's entry into in-region interLATA services prior to full compliance with the separate-affiliate requirements of Section 271 would invite the very same kind of anticompetitive cross-subsidization that has been a core antitrust policy concern in the telecommunications industry for the past three decades. What Judge Greene recognized in the post-divestiture world of six years ago remains true today:

> There can be no question but that, due to the limited effectiveness of regulation . . . , it would not be difficult for a Regional Company which is so inclined to divert rate payer funds to its competitive enterprises. . . . The consequences of such diversion would be to enable to the company to undersell its independent rivals . . . long and effectively enough to drive them from the market. . . . Staying power is certainly present in a situation such as that involved here, where a Regional Company, engaged in both competitive and noncompetitive markets, has the ability to make up for losses in the competitive arena indefinitely, or certainly as long as necessary. All it takes to achieve that objective is the ability to transfer funds to the [competitive] enterprise from the noncompetitive local operations accounts that are periodically replenished by the ratepayers.[105]

Distinguished economists recognize the continuing validity of antitrust concerns over cross-subsidization in this industry. "The gist of cross-subsidization theory is creatively self-serving accounting. . . . If the firm is regulated so that the price in its monopoly market is

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[105]United States v. Western Electric Co. , 767 F. Supp. 308, 324 (D.D.C. 1991) , aff'd, 993 F. 2d 1572 (D.C. Cir. 1993). Those observations were made in the context of acting on BOC applications to enter information services markets. They are, however, equally pertinent to BOC applications to enter in-region interLATA service markets -- absent the full safeguards provided by §272.

based on reported costs, it then has a specific incentive to misallocate unregulated business costs to the regulated sector. . . . For this reason, the prospect of cross-subsidization can make credible a threat to predate that would generally be not worth making in unregulated situations."[106] "Cross-subsidization is a means of vertical foreclosure when the monopolist uses excess profits from a safely monopolized market to subsidize losses in a vertically related one.

The anticompetitive use of cross-subsidization in a situation of the sort here at issue would be a prime example of the unlawful "use of monopoly power" in one market "to foreclose competition, to gain a competitive advantage, or to destroy a competitor" in another market.[107] It is in essence "a misuse of monopoly power" in one market "to beget monopoly" in another.[108]

For the above reasons, Ameritech's application for authority to provide interLATA services should be denied. In addition, given the unrebutted factual evidence from Michigan, Ohio and Illinois, the Commission should require that an independent auditor examine ACI and Ameritech to conclusively determine the extent of its violation of Section 272(b).

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[106]See, e.g., Brennan, Is the Theory Behind U.S. v. AT&T Applicable Today?, XL Antitrust Bulletin 455, 463-65 (1995)

[107]United States v. Griffith, 334 U.S. 100, 107 (1948); see also Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 482-83 (1992).

[108]Griffith at 108. See also Eastman Kodak at 480 n.29 ("The Court has held many times that power gained through some natural and legal advantage . . . can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next ") (quoting Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611 (1953)).

VIII. THE COMMISSION SHOULD NOT FIND THE REQUESTED AUTHORIZATION CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY, AS REQUIRED BY SECTION 271(d)(3)(C), UNTIL AMERITECH'S MONOPOLY POWER HAS BEEN MATERIALLY ERODED AND COMPETITORS HAVE OBTAINED A MEANINGFUL PRESENCE IN LOCAL EXCHANGE MARKETS THROUGHOUT MICHIGAN.

A. Effective Local Exchange Competition Does Not Yet Exist in Michigan.

Ameritech describes the local exchange market in Michigan as open to competition, with competitors entering the business and expanding their presence at a rapid rate. On pages 74 through 78 of its Brief Ameritech relates in detail the alleged number of potential competitors and the depth of competitive services which may be offered. Because Section 271(c)(a)(1)(A) explicitly requires that Ameritech's local competitors provide telephone exchange services to residential customers, Ameritech also attempts to convince the Commission that facilities-based residential competition exists to a significant degree in Michigan.[109] In fact, Ameritech even attempts to take the credit for this rosy state of affairs, claiming that its "procompetitive actions" -- along with those of the MPSC and the Commission -- is responsible for opening the local exchange market in Michigan to competition.[110]

The only "evidence" of facilities-based local exchange competition for residential consumers is the provision by Brooks Fiber of residential service in one exchange in Grand Rapids.[111] As Ameritech tacitly concedes,[112] TCG does not yet provide basic local exchange service to residential consumers in Michigan. The plain fact is, only a handful of

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[109]Ameritech Michigan Brief at 9; Harris/Teece Affidavit at 50, Table III-7.

[110]Ameritech Michigan Brief at 74.

[111]Harris/Teece Affidavit at 50, Table III-7.

[112]Ameritech Michigan Brief at 7.

residential customers today can decide to choose a telephone service provider other than Ameritech in Ameritech's service territory.

Ameritech also attempts to show that it is exchanging large, and growing, amounts of local traffic with competitors. According to Ameritech the amount of "reciprocal compensation minutes of use"[113] exchanged between it and competitive providers is about 63 million minutes of use in January, 1997.[114] This statistic is meaningless, because millions of MOUs can be generated by just one large business customer, such as a large internet provider; hardly evidence of extensive local exchange competition in Michigan.

Further support for all of the local exchange "competition" in Michigan is provided by Ameritech in a chart that purports to show Ameritech's access lines and revenues located near local competitors' fiber.[115] According to the chart, Ameritech has total combined business and residential revenues of almost $563 million within four miles of local competitors' fiber. Such data, however, is meaningless for determining the state of local competition in Michigan. What is relevant is the total intrastate revenues of Ameritech's competitors versus the total statewide revenue of Ameritech. According to information supplied by Ameritech, statewide, Ameritech had total combined business and residential revenues in excess of $1 billion.[116] TCG, for example, reported intrastate revenues to the MPSC for the year 1996 that were substantially below $10 million. This puts TCG's

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[113]It is ironic that Ameritech presents a chart listing the reciprocal compensation minutes of use exchanged with competitors like TCG, while at the same time refusing to pay TCG for such traffic. See Section III.B., *supra*.

[114]Joint Affidavit of Robert G. Harris and David J. Teece on Behalf of Ameritech Michigan at 28, Table III.1.

[115]Id. at 41, Table III.4.

[116]Id.

statewide intrastate market share versus Ameritech to be less than 1%. TCG urges the Commission to get corresponding information from the other Michigan CLECs. It is likely their information will be similarly minuscule.

Ameritech presents various other arguments that competition has come to Michigan. One argument involving TCG[117] is incorrect. Ameritech asserts that Sprint and TCG have an "alliance" that assists in making Sprint "very well-positioned to compete in the era of full-service telecommunications."[118] While there were discussions from late 1994 to early 1996 of a potential alliance between TCG and Sprint, no arrangement materialized.

All of this so-called evidence of competition is even more remarkable in the context of Ameritech's continued anti-competitive behavior which has *directly impeded* the development of ubiquitous facilities-based local exchange competition in Michigan. Section IV, supra, discussed Ameritech's anti-competitive actions thwarting the MPSC's implementation of intraLATA 1+ dialing parity and access to rights-of-way, both of which are Section 271 check list items. Ameritech's strategy to impede competitive entry is perhaps best illustrated by its failure to comply with the mandate of the MPSC and Michigan law that its cost of service must be established, discussed in Section III, supra. These anti-competitive actions on the part of Ameritech, taken when it hopes to gain regulatory approval to enter the long distance market, are unpleasant harbingers of what will come if Ameritech has already obtained interLATA authorization.

Another egregious example of Ameritech's anticompetitive behavior is actually provided by the company in its supporting documentation. Attached to one of the affidavits

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[117]TCG recommends that the Commission carefully check Ameritech's "evidence" concerning other competitive carriers.

[118]Ameritech Michigan Brief at 76; Harris/Teece Affidavit at 85.

are three confidential internal memoranda that show Ameritech, as early as September 9, 1996, had entered into three year, off-tariff deals for basic local exchange service.[119] These memoranda show that Ameritech went off-tariff to retain selected customers, and locked them into three year deals. These customers had been approached by TCG. Ameritech, however, in direct violation of Michigan law, failed to inform the MPSC that it offered an off-tariff deal to certain selected customers.[120] In addition, other customers should have the benefit of lower rates, yet generally available business rates have not fallen in Michigan. What happened in Michigan is more insidious. By being able to selectively lower its rates to customers for the purposes of impeding competition, Ameritech's residential customers and the bulk of its business customers are subsidizing off-tariff, cut-rate deals.

The plain fact is that if the markets in Michigan were competitive, there would be objective evidence of which customers would be aware. The compelling sign of a competitive market is price pressure. Ameritech has provided no evidence that residential prices have fallen in Michigan as a result of the alleged competition Ameritech postulates.[121]

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[119]Harris/Teece Affidavit, Appendix A - Volume 1.

[120]Ameritech is required to notify the MPSC of any rate reductions. Mich. Rev. Code §484.2304(2)(a).

[121]Indeed, the lack of price constraining local exchange competition in Michigan is illustrated by Ameritech Michigan's recent application to increase residential rates. See Re: application of Ameritech Michigan to restructure its basic local exchange rate and services, MPSC Case No. U-11306, filed January 21, 1997.

B. The Public Interest Cannot Be Met So Long as Legal or Economic Barriers to Implementation of All the Local Competition Provisions of the Act Remain.

In order to establish that the public interest has been met, there must be a *complete absence of any* legal or economic barriers to implementation of all the local competition provisions of the Telecommunications Act. Congress plainly did not intend the Commission to approve a Section 271 application on the basis of nothing more than a BOC's mechanical showing of its paper compliance with all "checklist" criteria and other listed requirements. Separate and apart from those particulars, the Act precludes approval until the Commission is able to find that "the requested authorization is consistent with the public interest, convenience, and necessity." [122]

The Supreme Court has repeatedly emphasized the breadth and flexibility of the public interest standard, particularly as applied to communications policy and regulation. The Court, for example, has characterized it as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."[123] It has also recognized that Commission decisions under this standard "must sometimes rest on judgment and prediction rather than pure factual determinations."[124] "In such cases complete factual support for the Commission's ultimate conclusions is not

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[122] §271(d)(3)(C).

[123] FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

[124] FCC v. WNCN Listeners Guild, 450 U.S. 582, 594 (1981).

required,"[125] since "'a forecast of the direction in which future public interest lies necessarily involves deduction based on the expert knowledge of the agency.'"[126]

Similarly, it is now beyond question that general antitrust policy objectives should play a role in the Commission's public interest determinations. Indeed, the Commission may find in some cases "that antitrust considerations alone would keep the statutory standard from being met . . . ."[127] The courts thus "have insisted that the agencies consider antitrust policy as an important part of their public interest calculus."[128]

One fundamental antitrust policy relevant to the public interest determination in this instance is the need to prevent the use of monopoly power over local exchange markets to suppress competition in long distance markets through cross-subsidization, discrimination and other predatory practices. That policy remains as vital today as it has been throughout the past several decades, and it continues to dictate preclusion of a local exchange carrier's provision of long distance service within any region where it still retains monopoly power over local exchange service.[129]

There is, however, a second and equally critical antitrust policy objective to be considered, one corresponding to what Mr. Turetsky has aptly described as a "far-reaching

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[125]Id. at 594-95.

[126]FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978) (quoting FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 29 (1961)).

[127]United States v. RCA, 358 U.S. 334, 351 (1959); see also NBC v. United States, 319 U.S. 190, 222-24 (1943).

[128]United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc); see also Northern Natural Gas Co. v. FPC, 399 F.2d 953, 961 (D.C. Cir. 1968).

[129]See generally Brennan, Is the Theory Behind U.S. v. AT&T Applicable Today?, XL Antitrust Bulletin 455-82 (Fall 1995); Noll, The Role of Antitrust In Telecommunications, XL Antitrust Bulletin 501-28 (Fall 1995).

goal" of the 1996 legislation generally and of Section 271 in particular: "to bring increased competition to all sectors of the industry -- including the local exchange."[130] Section 271 serves this second purpose by requiring a judgment "whether the local markets are open enough to act as a dependable natural constraint on anticompetitive conduct"; otherwise a BOC's entry into long distance, "while it still retains too many vestiges of its old local exchange monopoly, could actually increase the incentives for the Bell to exploit that power" while also "preserving its lucrative local exchange domain . . . ."[131] The Commission, moreover, should not equate the required degree of openness with "paper promises, whether the paper sets forth a national law, a regulator's rule, a private contract, or an arbitrator's decision"; what matters is "whether the Bell faces the kind of market in which it has to gear its business toward competing to retain its customers" and "whether competitors can successfully enter and expand in the local exchange markets in a timely fashion."[132] In short, "[f]ull use of the public interest requirement" in conjunction with but independent of the checklist and other specific requirements is "the route set forth under the statute to ensure that local exchange markets are truly open to all competitors."[133]

Accordingly, a central issue to be addressed in applying the public interest standard in this proceeding is whether Ameritech's monopoly power has been materially eroded, as evidenced by a meaningful presence of competitors, in local exchange markets throughout Michigan. The Commission's analysis of this issue should be guided by the definition of monopoly power as established in antitrust law and summarized below.

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[130]Turetsky Remarks of July 22, 1996, at 5 (emphasis in original).

[131]Id. at 5-6 (emphasis in original).

[132]Turetsky Remarks of Sept. 30, 1996 at 3, 14.

[133]Id. at 14.